

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

DELAWARE STATE AND FEDERAL EMPLOYEES,	:	
LOCAL 1029, LIUNA,	:	
	:	
and	:	Representation Petition
	:	<u>16-09-1080</u>
DELAWARE DEPARTMENT OF SERVICES FOR	:	
CHILDREN, YOUTH AND THEIR FAMILIES,	:	(CERTIFICATION)
DIVISION OF PREVENTION AND BEHAVIORAL	:	
HEALTH SERVICES, CHILD AND FAMILY CARE	:	
COORDINATION UNIT.	:	

RE: PSYCHIATRIC SOCIAL WORKERS II AND III¹
(CARE COORDINATOR SUPERVISORS)

Appearances

Raymond G. Heineman, Esq., Kroll Heineman & Carton, for LIUNA Local 1029
Aaron Shapiro, State Labor Relations & Employment Practices, HRM/OMB, for DSCYF

BACKGROUND

The State of Delaware is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994). The Department of Services for Children, Youth and their Families (“DSCYF”) is an executive branch department, of which the Division of Prevention and Behavioral Health Services (“DPBHS”) is an agency. The Child and Family Care Coordination Unit (“CFCCU”) is a DPBHS agency unit.

The Delaware State and Federal Employees, Local 1029, is an employee organization with

¹ The working title for the Psychiatric Social Worker position(s) in question is Care Coordinator Supervisor. .

the meaning of 19 Del.C. §1302(i) and is affiliated with the Laborers' International Union of North America ("LIUNA").

On September 15, 2016, LIUNA filed with the Public Employment Relations Board ("PERB") a Petition for Bargaining Unit Determination and Certification of Exclusive Bargaining Representative, seeking to represent a bargaining unit of:

All regular full and part-time Psychiatric Social Workers I, II, III; Family Service Specialists; Family Service Assistants I, II; Adolescent Treatment Services Coordinator; and Administrative Specialist I, II III employed by the State of Delaware DSCYF/DPBHS Child Care Coordination Units (excluding Treatment Team Leaders and all other supervisory employees as defined by the Public Employment Relations Act).

The State objected to the inclusion of Psychiatric Social Worker ("PSW") II and III positions in the proposed bargaining unit, asserting they are statutory supervisors within the meaning of 19 Del.C. §1302(s). It was established during the course of these proceedings that there are currently no PSW II positions which are employed in the CFCCU.²

Two days of hearing were held on November 16 and November 30, 2016, for the purpose of receiving evidence concerning the supervisory status of PSW II and III positions. Thereafter, the parties presented closing arguments in the form of simultaneous post-hearing submissions, which were received on January 3, 2017. The following decision results from the record thus created by the parties.

FACTS

The facts set forth herein are derived from the evidence and testimony presented by the parties.

² The record created by the parties (except for the introduction of the Job Description for Psychiatric Social Worker II) was limited to the duties and responsibilities of Psychiatric Social Worker III positions

The Division of Prevention and Behavioral Health Services is a division of the Delaware Department of Services for Children, Youth and Their Families. DPBHS provides behavioral health services statewide, including early intervention services, mental health and substance abuse treatment programs for children and youth.

The Child and Family Care Coordination Unit provides mental health and substance abuse services to eligible children and youth under the age of 18 who are either Medicaid eligible or who do not have health insurance. The services provided are child/youth centered, involve the family and coordinate services through mental health and other service providers in the community. In July, 2016, the former Clinical Services Management Team (CSMT) was reorganized and replaced by the CFCCU. Clinical services for children/youth requiring intensive behavioral health care were primarily contracted for and monitored under the CSMT. The CFCCU, on the other hand, employs a comprehensive “wraparound” service delivery system which focuses on individualized care planning and service and treatment coordination. The CFCCU works with families, communities, schools, the juvenile justice system, and health care providers to coordinate care.

The CFCCU operates statewide, and is administratively divided into Northern and Southern regions. Each region is managed by a Psychologist Supervisor who each report directly to the Psychologist Manager (who reports to the DPBHS Deputy Director). Each region is organized into six Child & Family Care Coordination Teams. Each of the six teams is supervised by a Psychologist/Treatment Team Leader (“Team Leader”). *Joint Exhibit 1.*

CFCCU employs 12 Psychiatric Social Worker IIIs (“PSW III”) and 24 Adolescent Treatment Services Coordinators (“ATSC”), who provide direct case management services to assigned clients. The services are provided through groups which are comprised of one PSW III and two ATSCs. *Joint Exhibit 1.* Each Team Leader oversees two groups (which together

constitute a team); one group provides Tier 4 level services and the other group provides Tier 5 level services. Clients with the most complex needs are assigned to Tier 5.

The Team Leaders are responsible for assigning all cases to the care coordinators (including PSW IIIs and ATSCs) on their teams. CFCCU has established maximum case management targets for case coordinators with Tier 4 coordinators expected to handle more cases than those assigned Tier 5 cases. PSW IIIs and ATSCs are required to appear in court and to maintain contact with families, schools and other professional care providers in order to provide effective care coordination and comprehensive service to their clients. They serve as facilitators and strategic interventionists for families, in coordinating the care required by the children/youth who are assigned to them.

PSW IIIs spend the majority of their time (85%-95%) providing direct case management services to their clients. Their direct service responsibilities are identical to those provided by ATSCs, except that they are customarily assigned more complex and/or difficult cases. Direct case management duties under the wraparound model require frequent interactions with families, community supports, schools, courts and behavioral health service providers. It also requires PSW IIIs and ATSCs to monitor and continuously assess the appropriateness of treatment being provided, to interact with the client's school and to update the courts on a client's progress and on-going needs. The interaction with families is more direct, comprehensive and frequent than under the previously used clinical management service delivery model. All PSW III and ATSC case related interactions must be documented and maintained in the FACTS³ system in a timely, clear, and accurate manner.

³ FACTS (Family and Child Tracking System) is the electronic case management system used by DSCYF and the CFCCU for all case file information. PSW IIIs and ATSCs are responsible to log all information relevant to each case into FACTS in a timely and accurate manner.

PSW IIIs are experienced case coordinators. They are expected to provide support and guidance to ATSCs in their group. Although the target caseload for a PSW III is slightly lower than for ATSCs, testimony established that in practice they more often than not have caseloads equal to those of ATSCs, and are customarily assigned more complex cases. Occasionally, a case may be placed on a PSW III's docket with the intent that it will be later transferred to an ATSC in the same group in order to minimize bouncing cases between groups.

PSW IIIs assist ATSCs with care coordination by providing "guidance and support." They provide coverage when an ATSC is absent and may participate in providing a monthly training session for their team. PSW IIIs also do monthly documentation reviews of randomly selected ATSC case records in the FACTS system, which requires that they look at the case records to determine whether the duties listed on a matrix (which includes time frames) for phone calls, contacts and meetings are being met, are promptly recorded, and are appropriately documented according to CFCCU standards.

In addition to case management duties, PSW IIIs are responsible for "administrative supervision" of ATSCs in their group. This includes monitoring and approving the use of accrued leave for ATSCs in the State's electronic leave system, eStar. ATSCs electronically submit leave requests to PSW IIIs, who are responsible to determine whether the requesting ATSC has sufficient leave to cover the request. If the ATSC has sufficient leave accrued and available, the PSW III routinely approves the leave request. Although in the past the PSW IIIs were also responsible to ensure there would be sufficient operational coverage within the care team, during an ATSC's absence, this is no longer necessary because coverage is now provided across teams. When a team member is absent, however, he or she is expected to provide any reports or updates which may be needed during the planned absence.

PSW IIIs often cover the duties of absent team members but ATSCs may also cover for each other or the PSW IIIs, as well. It is clear that the teams work collaboratively and cooperatively to support each other and to insure that all duties are covered when a colleague is absent. Clients and their families are also advised as to whom to contact in case of an emergency or behavioral health crisis during the absence of their assigned ATSC or PSW III.

At the end of each calendar year, PSW IIIs meet with their Team Leaders to discuss the performance of ATSCs in their groups. The discussions concern performance, positive and/or negative input received during the year from clients and/or service supports, FACTS record keeping, and adherence to CFCCU case management standards. This review is conducted collaboratively between the PSW III and the Team Leader. The PSW III then creates a draft annual performance review document which is reviewed by the Team Leader before it is presented to the reviewee. The PSW III and the Team Leader will also agree on any suggested improvements for the reviewee.

Current performance expectations (i.e., Performance Plans) for PSW IIIs, ATSCs and Team Leaders under the wraparound service delivery method are uniform and were developed independently by senior CFCCU management. *Joint Exhibits 6, 7 and 8.* The uniform Performance Plan for PSW IIIs differs from that of ATSCs only in the addition of “Goal 4: Additional Duties and Responsibilities of Care Coordinator Supervisors”, which states:

- A. Role model and provide guidance on the values and principles of the Wraparound Process.
- B. Assist the CFCC [*Team Leader*] with providing support, feedback and problem solving with Care Coordinators, as needed.
- C. Supports the CFCC [*Team Leader*] in providing supervision and observation of new and existing staff.
- D. Assist the CFCC [*Team Leader*] with instructing new staff regarding Wraparound policies and procedures, and maintain follow through on policies with existing staff.

- E. Provide guidance and observation for staff by attending Court hearings and/or CFM/CFTM, as needed or requested.
- F. Help plan and conduct Agency team meetings and trainings, as needed or requested.
- G. Attend requested meetings with the CFCC [*Team Leader*] or as a backup, if the CFCC [*Team Leader*] is unable to attend
- H. Review documentation for accuracy and strength-based language, including Progress Notes, POCs, authorizations, Transitional/Discharge Plans and Crisis Plans for families.
- I. In conjunction with CFCC [*Team Leader*], utilize reports and data provided by Wraparound to continuously improve the care coordination provided to children and families.
- J. Ensure personnel documents (e.g., Personal Development Plans, Injury reports, family leave requests, etc.) are completed in a timely manner.
- K. Other duties as assigned by CFCC [*Team Leader*] and/or managerial staff. *Joint Exhibit 6.*

PSW IIIs, as well as ATSCs and Team Leaders, often serve on hiring panels. It was not clear how often vacancies occur but there are only 26 ATSC and 4 FSA positions in the CFCCU. Participating as a member of a hiring panel is not a performance expectation for PSW IIIs. Because hiring panels are required to be diverse with respect to race and gender, some PSW IIIs serve on many panels.

When a vacancy exists in an ATSC position either the PSW III or the Team Leader is the designated Hiring Manager. Hiring Manager responsibilities are predominantly ministerial and include contacting HR to initiate the posting of the vacancy, receiving the certified list of applicants, assembling a hiring panel of three to four CFCCU employees (subject to approval by HR), distributing the applications and coordinating the culling down of applicants with either the hiring panel or the Team Leader to identify candidates for interview, and scheduling the interviews. The questions to be asked during the interview process are pre-scripted and provided by the HR department. Panel members rotate in asking the questions and no follow-up questions are permitted. Each member of the panel then ranks the candidates based upon their qualifications,

education, experience, and interview performance. The panel reaches a collective recommendation and the finalists are presented to the Team Leader who discusses with the PSW IIIs. The Team Leader retains final authority for selecting the successful candidate for hire.

Following hire of a new ATSC, the PSW III is responsible to “on-board” the new employee by introducing them to the CFCCU’s performance standards, practices and procedures, providing and reviewing with orientation materials, and coordinating access to the State’s resources and network (including FACTS and leave reporting).

ISSUE

ARE THE POSITIONS OF PSYCHIATRIC SOCIAL WORKERS II AND III, EMPLOYED BY THE DIVISION OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES, DIVISION OF PREVENTION AND BEHAVIORAL HEALTH SERVICES, CHILD AND FAMILY CARE COORDINATION UNIT STATUTORY SUPERVISORS WITHIN THE MEANING OF 19 DEL.C. §1302(s), AND THEREFORE INELIGIBLE FOR REPRESENTATION FOR THE PURPOSES OF COLLECTIVE BARGAINING UNDER THE PUBLIC EMPLOYMENT RELATIONS ACT?

OPINION

At the outset, I note that the CFCCU was created and began implementing the new method of service delivery on or about July 1, 2016. The wraparound practice model is significantly different from the clinical service delivery model which had previously been used to serve children and youth with complex behavioral health needs. Dr. Tracy Frazier, who is the Psychology Manager for the CFCCU, described the current work of this unit as follows:

The Child and Family Care Coordination Unit embraces the wraparound practice model which includes an Intensive Care Coordination Unit where we are responsible for working as a team to support the individual needs of a child and family. We work in collaboration with community stakeholders

and the natural supports that the family may have identified. We also work with service providers who have a vested interest in the well-being of a child and family. And that collaborative relationship ... we meet on a regular basis to identify an individualized plan of care. We implement that plan of care and we monitor their progress. That is the primary responsibility of the wraparound process and the overall goal of the wraparound process is to really maintain the child and the family in their natural environment and to build the natural supports, so there's less reliance on professional services and child and family are more connected to their community.⁴

At the time of the hearing, the wraparound model had not been fully implemented. Although standard performance plans had been developed for PSW IIIs, they were uniform and not individualized, and no PSW III had been evaluated under the new service delivery model and performance expectations. I also note that while testimony was offered by three PSW IIIs, the Psychology Manager, both regional Psychology Supervisors, and a departmental Labor Relations representative, no testimony was provided by any Treatment Team Leaders, who directly supervise PSW IIIs and work most closely with them in coordinating the work of the treatment teams.

The Public Employment Relations Board has broadly construed employee representation as a fundamental right of individual employees under the Public Employment Relations Act. *In re: University of Delaware Bus Drivers*, Representation Petition 95-01-126, II PERB 1207, 1210 (1995). This Board has held that "... except for the most compelling reasons, eligible employees should not be denied access to the rights and protections to which they are otherwise entitled [under the statute]." *In re: Internal Affairs Officer of the Wilmington Fire Department*, Representation Petition 95-06-142, II PERB 1387, 1397 (1996).

The PERA excludes supervisory employees from inclusion in all appropriate bargaining units created after September 23, 1994. 19 Del.C. §1310(d). A supervisory employee is defined to be:

... any employee of a public employer who has authority, in the interest of the

⁴ Testimony of Dr. Frazier, *TR* at p. 14.

public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such actions, if the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement. 19 Del.C. §1302(s).

PERB has adopted the NLRB's guidance in requiring that the burden of establishing supervisory status be met by the party asserting that such status exists. *In re: Sussex County and CWA*, Rep. 07-02-557, VI PERB 3949, 3957 (2008). Following NLRB guidance in evaluating evidence, "the mere use of a title or the giving of 'paper authority' which is not exercised does not make an employee a supervisor." *North Miami Convalescent Home & Local 1115*, 224 NLRB 1271, 1272 (1976). General assertions which are not specific and/or which are contradicted by other evidence are not sufficient to meet the burden. Supervisory status must be established based on the preponderance of the evidence presented.

In evaluating supervisory status, the Delaware PERB has adopted a sequential analysis:

1. Does an employee have the authority to engage in one or more of the twelve listed activities?
2. If so, does the exercise of this authority require the use of independent judgment?
3. Does the employee hold and exercise that authority in the interest of the public employer?

In re: Kent County Paramedics, Rep. Pet. 04-08-447, V PERB 3235, 3240 (2005). The requisite supervisory authority and responsibility must be consequential and fundamental to the operation of the workplace. Supervisory employees must also be accountable for the performance of the purported supervisory functions.

The State asserts CFCCU PSW IIIs are "front-line working supervisors." It asserts they have the authority to responsibly direct ATSCs, to assign work, to hire, or to effectively recommend these actions, through the exercise of independent judgment and in the State's interest as an employer. It argues PSW IIIs serve as hiring managers and effectively recommend who to

select for interviews and who to hire; explain performance requirements and expectations, monitor and guide performance and prepare formal annual performance reviews for ATSCs; assign specific tasks; direct and guide ATSCs to improve performance; hold employees accountable for poor performance; and manage employee leave.

The State does not assert that PSW IIIs have the authority to transfer, suspend, layoff, recall, promote, discharge, reward, or adjust the grievances of any other employees.

The State also argues:

...The nature of the Unit's work and its resulting culture are collaborative and mutually supportive. This is closely linked to the methodology used to provide services to the families the Unit cares for. But, the reality that PSW IIIs are direct service providers themselves and seemingly provide as much mentoring to ATSCs as they do administrative supervision does not diminish their supervisory authority and functions. Nor is the status diminished because the Unit also employs two levels of supervisors above PSW IIIs (Team Leaders and Regional Supervisors). These higher level positions do not supplant or replace PSW IIIs as direct supervisors of ATSCs, but serve in a primarily clinical role as necessitated by the nature and complexity of the Unit's work, and the attendant licensure and accreditation standards.⁵

LIUNA argues the duties and responsibilities of PSW IIIs are fundamentally the same as those of the ATSCs. Under the newly adopted wraparound model of service delivery, the essential functions of the position are client focused and include maintaining a full caseload, interacting with the juvenile justice system and service providers, and providing technical guidance and support to ATSCs on a care coordination team. It agrees that PSW IIIs serve in a "lead" capacity but notes that they work collaboratively and interchangeably with ATSCs to cover cases. It argues there is no evidence that PSW IIIs exercise independent judgment or are accountable for the work of the ATSCs. They are responsible to "perform spot checks on FACTS documentation", and to assist the ATSCs in re-doing them if they are found to be inadequate. They have no consequential

⁵ State's closing argument, p. 13-14.

authority to discipline any other employees and the monitoring of leave is a ministerial function. They participate as members of hiring panels but do not have the independent authority to effectively recommend or make a hiring decision. LIUNA also asserts they do not exercise independent authority in performing annual reviews of ATSC's performance and those reviews do not result in consequential personnel actions affecting the reviewed employees.

Responsibility to Direct

In order for a putative supervisor to have "responsibility to direct" another employee, that individual must be accountable for the other employee's performance. In *Oakwood Healthcare*, the NLRB defined accountability:

[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.⁶

In order to establish that a putative supervisor meets this criteria, it must first be established that the employee directs other employees, and if so, it must then be established that the employees are held accountable for that direction of other employees.

In this case, the State has not provided evidence that PSW IIIs are responsible to direct the work of ATSCs or that they are held accountable for direction of ATSCs. It is well established that job descriptions and other documents suggesting the presence of supervisory authority are not given controlling weight. The party asserting supervisory status has the burden to establish actual authority, not simply paper authority.⁷

[C]onclusory evidence is not sufficient to establish supervisory status; instead the Board requires evidence that the employee actually possesses the ... authority at issue... [I]n determining whether accountability has been

⁶ *Oakwood Healthcare*, at p. 692.

⁷ *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

shown, we shall similarly require evidence of actual accountability... Accountability under *Oakwood Healthcare* requires only a prospect of consequences. But there must be a more-than-merely-paper showing that such a prospect exists. That is, where accountability is predicated on employee evaluations, there must be evidence that a putative supervisor's rating for direction of subordinates may have, either by itself or in combination with other performance factors, an effect on that person's terms and conditions of employment.⁸

Dr. Tina Fountain, the regional Psychologist Supervisor for the northern division of the Unit, testified that PSW IIIs have duties in addition to providing clinical care as outlined in the standard Performance Plan which was issued to all PSW IIIs for the period of July 1 through December 30, 2016. Dr. Fountain testified that she was aware on any instances in which an ATSC required any type of corrective action, but she expected that such corrective action might include training identified by a PSW III. *TR p. 44*. She also testified that if a PSW III had a problem or performance issue with an ATSC, the PSW III would be expected to report the problem to a Team Lead, who would in turn report it to the appropriate Regional Supervisor. The issue would be addressed with ATSC only after consultation with these supervisors and would not be determined independently by the PSW III.

The record does not support the conclusion that PSW IIIs determine which jobs are to be performed by ATSCs nor are PSW IIIs held accountable for the failure of ATSCs to perform their jobs. In fact, the record is replete with references to the manner in which PSW IIIs "support", "provide guidance", and "mentor" ATSCs. The testimony does not establish that PSW IIIs have independent authority to exercise their judgment in taking any corrective actions for performance lapses or mistakes by ATSCs nor are they disciplined for such lapses by ATSCs. I do not find support for concluding that PSW IIIs direct the work of others.

⁸ *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

Assignment of Work

In the *Sussex County and CWA* decision, PERB adopted the NLRB's standard for assigning work as set forth in *Oakwood Healthcare*. "Assign" refers to:

... the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks to an employee. That is, the place, time and work of an employee are part of his/her terms and conditions of employment.

The [NLRB] clarified that choosing the order in which an employee performs discrete tasks within an assignment is not indicative of assignment authority. It drew the line between the assignment of overall duties to an employee, as distinguishable from providing *ad hoc* instruction to an employee to perform a specific task within the normal course of operations.⁹

The record establishes that cases are assigned to both ATSCs and PSW IIIs by Treatment Team Leaders. In the occasional circumstance that a Treatment Team Leader is unavailable, a PWS III may make a case assignment, but it is undisputed that this an unusual exception.

In the event that an ATSC is absent from work, the PSW III on the team may provide coverage or ask another ATSC to cover any court appearances or other hearings/meetings, as necessary. These assignments are made based upon availability rather than on the exercise of independent judgment and discernment based on a comparative evaluation of the skills of team members.

... If there is only one obvious and self-evident choice ... or if the assignment is made solely on the basis of equalizing workloads, the assignment is routine or clerical in nature and does not implicate judgment, even if it is made free of control by others and involves forming an opinion or evaluation by discerning and comparing data.¹⁰

The employer has not met its burden to establish by a preponderance of the evidence presented that PSW IIIs assign work to ATSCs, or that when they do assign an ATSC to cover a

⁹ *Sussex County* at p. 3959

¹⁰ *Oakwood* at 693.

task for an absent co-worker that such assignment rises above being routine and/or clerical in nature.

Hiring

PSW IIIs often serve on hiring panels and/or as hiring managers to fill vacancies in ATSC and administrative positions. The evidence of record does not establish that the PSW IIIs exercise independent authority in selecting applicants to be interviewed or in making hiring decisions, nor that they make effective individual recommendations. The authority to effectively recommend is generally understood to mean “the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.” *Children’s Farm Home*, 324 NLRB 61 (1997).

It is the recommendation of the entire panel (which usually includes an ATSC and/or a Team Leader) which is presented for consideration and approval for hire. Testimony established that the ultimate decision on hiring is made by the Team Leader, sometimes in consultation with the PSW III. That does not, however, support the conclusion that the PSW IIIs exercise independent judgment or have authority to make a hiring decision. The roles played by CFCCU employees in hiring new employees again evidences the collaborative work environment in this agency.

Monitoring of Leave

It is undisputed that PSW IIIs routinely approve leave requests from ATSCs and have in the past also approved leave requests from Family Service Assistants (before they were reorganized to report directly to the regional Psychology Supervisors). The leave is approved if an employee has a sufficient accrued balance. PSW IIIs do not have authority to approve leave

for any employee who does not have a sufficient accrued leave balance to cover the absence. The evidence presented establishes that the approval of leave usage is of a “merely routine or clerical nature.”

The only instance on which evidence was received relating to leave issues involved an ATSC who reported to PSW III Patricia Clancy. The ATSC had twice requested to use leave in excess of her accrued balance and was having attendance related issues. Ms. Clancy reported and discussed the problem her Team Leader, who directed her to contact the departmental Human Resources (HR) office. The regional supervisor was also involved in developing the corrective plan for this ATSC. With the direct guidance from and in collaboration with her Team Leader and HR department staff, Ms. Clancy notified and counselled the employee that she would not be approved for additional paid leave unless and until she improved her accrued leave balances. No evidence was presented which contradicted Ms. Clancy’s testimony that she was following the direct guidance of her Team Leader and the HR department. Consequently, I do not conclude that the PSW III was exercising authority, independent judgment or effectively recommending discipline in this instance.

Performance evaluations

The performance of ATSCs is reviewed annually by the PSW IIIs, but this process is undertaken collaboratively by the PSW III (the “evaluator”) with his or her Team Leader (who serves as the “reviewer”). In *DHSS Stockley Center (Habilitation Supervisors)*, Rep. Pet. 95-06-145, II PERB 1399, (1996), this Board held that the State’s performance review process was not an indicia of supervisory status because it was not undertaken independently by the evaluators.

Again looking to NLRB guidance, performance evaluations are not considered a supervisory function where the ratings are not used as a basis by the employer for taking either

positive or negative action. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

Evaluating a case in which an employer's assertion that charge nurses were supervisors of certified nursing assistants, the NLRB opined:

There is no evidence, however, that any action, either positive or negative, has been or might be undertaken as a result of the charge nurses' evaluation of [CNA's] performance. The employer does not award merit increases or any other type of bonus. In fact the Director of Nursing testified that the only effect of a positive evaluation is that the employee gets to keep working at the facility. Further the employer did not introduce any evidence that any adverse action might be taken against a charge nurse as a result of a "Needs Improvement" evaluation on the "Directs CNAs" performance factor (or any other performance factor for that matter), not did the employer ever inform charge nurses that any adverse action might result from a negative rating on the "Directs CNAs" performance factor. *Golden Crest Healthcare Center*.

Unlike the facts in *DOC, Division of Community Corrections (Probation & Parole Supervisors*, Rep. Pet. 99-03-256, III PERB 1925, 1933 (2000), the evidence in this case is that PSW IIIs and Team Leaders work together to develop the performance evaluations. For these reasons, the evaluation of ATSCs by PSW IIIs is not independent nor does it constitute an indicia of supervisory function where there is no evidence that the evaluation has consequences for the reviewee.

Based on the record created by the parties, the employer has not met its burden to establish, by a preponderance of the evidence, that the PSW IIIs exercise consequential supervisory authority as that term is defined in §1302(s) of the PERA. The differentiated performance expectations for PSW IIIs which distinguish their work from that of ATSCs requires them to "assist", "support" and "help" Team Leaders and to work "in conjunction" with them. The two duties for which PSW IIIs are exclusively responsible are review of case management documents and ensuring that personnel documents are completed in a timely manner. These limited, exclusive expectations for

PSW IIIs (above and beyond their case management duties) are consistent with the evidence adduced through testimony. Considered as a whole, the record establishes that PSW IIIs provide administrative support to the Team Leaders and guidance and support to ATSCs in meeting case management goals; it does not, however, establish a sufficient basis to conclude that they are statutory supervisors who are ineligible for representation for purposes of collective bargaining.

DECISION

Based upon the record created by the parties in this matter, Psychiatric Social Workers II and III, working as Care Coordination Supervisors in DSCYF/DPBHS Child and Family Care Coordination Unit are not statutory supervisors within the meaning of 19 Del.C. §1302(s).

Wherefore, the appropriate bargaining unit is determined to be:

ALL REGULAR FULL AND PART-TIME NON-SUPERVISORY EMPLOYEES OF THE CHILD & FAMILY CARE COORDINATION UNIT OF DSCYF/DIVISION OF PREVENTION & BEHAVIORAL HEALTH SERVICES. THIS UNIT CURRENTLY INCLUDES THE FOLLOWING POSITIONS: PSYCHIATRIC SOCIAL WORKER III; FAMILY SERVICE ASSISTANT I, II; ADOLESCENT TREATMENT SERVICES COORDINATOR; AND ADMINISTRATIVE SPECIALIST I, II, III.¹¹

This decision is accompanied by a Notice of Bargaining Unit Determination which the State is required to post in the workplace to advise employees of this determination and in order to allow any other labor organization which seeks to be included on the representation election ballot to petition for inclusion (with a showing of support of at least ten percent (10%) of the bargaining unit) in accordance with the requirements of 19 Del.C. §1311(c).

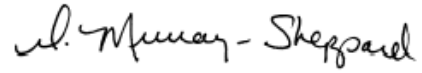
An election will be scheduled and conducted within forty-five (45) days of the issuance of

¹¹ The listing of currently included positions is based upon the October 17, 2016 Organizational Chart for the Child and Family Care Coordination Unit entered into the record as Joint Exhibit 1.

this decision in order that bargaining unit employees may determine if and by whom they wish to be represented for purposes of collective bargaining.

IT IS SO ORDERED.

DATE: August 8, 2017

A handwritten signature in cursive script, reading "D. Murray-Sheppard".

DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.